

Dennis Kelly, and <sup>2</sup> Appellants. | Richard Ld. Bellew, Respondt;  
 Mary his Wife, <sup>3</sup> & E Contra.

The CASE of the APPELLANT,  
 Richard Lord Bellew.

28 Nov.  
 1663.

**I**N 1663, John late Lord Bellew being seiz'd of an Estate of about 1500 *l. per Annum*, Marry'd Mary late Lady Bellew, an Heirefs of an Estate of 600 *l. per Annum*, who had also a considerable Personal Estate, and before Marriage Covenanted with the said Mary, and others her Trustees, That he would within the space of one Year from the Date of the said Articles, settle his said Estate on himself for Life, Remainder of part to the value of 800 *l. per Annum*, in Jointure on the said Mary, with Remainder of all to the Sons of the said Marriage, in such manner, either by way of general Intail, or by way of Limitation or Remainder, to the first and other Sons of the said Marriage, and the respective Heirs-Male of their Bodies, as the said Trustees, or said Mary Bermingham, shou'd require. That he would charge the said Estate (the Jointure-Lands excepted) with Portions for the Daughters of the said Marriage; if but one 2000 *l.* and 40 *l. per Ann.* Maintenance, if more than one, 1000 *l.* apiece, with 20 *l. per Ann.* Maintenance, with power to charge the said Estate, (except, as before,) with his Debts, he then owing Debts.

14 Feb.  
 1667.

In 1667, the said Lord Bellew having Issue by his said Wife, Walter late Lord Bellew, by Deed duly Executed, reciting, That the same was in Execution of the said Marriage Articles, and to the intent and purpose that his said Estate shou'd remain to the Issue-Male of his Body, on the Body of the said Mary, subject only to the Debts of him the said Lord John, and the Portions therein mention'd, did convey all his said Estate to the use of himself for Life, with Remainder of part, pursuant to the said Articles to his said Wife for her Jointure, Remainder to the said Walter for Life, Remainder to the Sons of the said Walter in Tail-Male, Remainder to every other Son which he should beget on the Body of his said Wife in Tail-Male, with several Remainders over-charg'd with Portions for his Daughters, as per Articles to be rais'd when payable, out of the Profits of the said Estate, with a Power to the said Walter, when in Possession, to make Leases, not exceeding twenty one Years, or three Lives, and to charge the Estate with a Jointure for his Wife, and Portions for his Daughters, in manner exactly as Lord John had for his own Daughters, with Power to the said Lord John, in case of Issue-Male by him, on the Body of the said Mary, to lessen the said Portions appointed for his Daughters; with Power also to said Lord John, to settle a Jointure on a second Wife, and Portions on Children by a second Venture. Then follows this Proviso.

*Provided always*, That it shall be lawful for the said Lord John Bellew, to Mortgage or otherwise Charge his said Estate (except the said Jointure Lands) with his Debts, or otherwise, as he shou'd think fit.

8 Octo.  
 1686.

In 1686, the said Lord John Bellew, and said Walter Bellew, on the Inter-marriage of the said Walter with Frances Arabella Wentworth, in Consideration of said Marriage, and a Portion of 6000 *l.* 3000 *l.* whereof was to be paid by the late King JAMES and his late Queen, and the other 3000 *l.* by Sir William Wentworth, Father of the said Frances; of which last 3000 *l.* 1000 *l.* with all the Interest thereof, remains still unpaid, did Covenant with the said Sir William, to settle a Jointure of 800 *l. per Ann.* on the said Frances; and the said Lord John reciting the said Power contain'd in the said Settlement of 1667, of charging his Estate with his Debts, or otherwise, as he shou'd think fit, did, in virtue

of



of the said Power, charge the said Estate, and other Lands purchased by him the said Lord John, since perfecting the said Deed of 1667, with Portions for the Daughters of the said Walter; if but one, 4000 l. if more than one, 6000 l. among them all.

7 Oct.  
1686.

Said Lord John did by Deed of 1686, convey the said purchased Premises, being several small Parcels intermix'd with the *Demesne* Lands, of the value of 80 l. *per Ann.* to the use of himself for Life, Remainder to the said Walter for Life, Remainder to the Sons of the said Walter in Tail-Male, Reversion to his own right Heirs.

In 1691, the said Lord John died, Outlaw'd of High-Treason, having Issue the said Walter, and present Lord Bellem, and Margaret late Countess of West-Meath.

In 1694 the said Walter died, leaving Issue two Daughters by the said Frances Arabella, viz. Mary and Frances Bellem.

In 1695, the present Lord Bellem marry'd the Countess of Newburgh, with whom he had a Fortune of 13000 l. a great part whereof was laid out in Reversing the Outlawry of the said Lord John.

In 1702, the said Mary marry'd Mr. Kelly, and soon after she and her said Husband exhibited a Bill in the High Court of Chancery in Ireland, against the present Lord Bellem, praying a Decree for 3000 l. with Interest since the time of their Marriage, at the rate of 10 l. *per Cent.* and to be let into perception of the Profits of the Lands subject to the said Portions, till payment.

The Lord Bellem, in his Answer, insisted on the said Marriage-Articles of 1663, and the said Deed of 1667; and that the said Power therein contained, of charging the said Estate with the said Lord John's Debts, or otherwise as he shou'd think fit, being larger than the Power expressed in the said Articles of 1663, was void, and that the same cou'd not support the Plaintiff's demands, and the; rather, because Lord Walter had an expresse Power by the Deed of 1667, to charge the Estate with 1000 l. apiece for his Daughters Portions; and that the said Power of charging it with the Lord John's Debts, or otherwise as he shou'd think fit, was destructive to the Settlement, because Lord John might, by means thereof, charge the Estate to the full value, and so disappoint the very Intent of the said Marriage Articles, by which the said Settlement shou'd be guided: That he was a Purchaser by his Mothers Fortune, within the true Intent of the said Articles of 1663, and on a more valuable Consideration than the Plaintiffs: That he was willing to pay the Plaintiffs as much as the said Lord Walter their Father had Power to limit, being 1000 l. and no more. That if the Plaintiffs were Purchasers, they were so with Notice of the said Articles of 1663, the same being recited in the said Deed of 1667, which is recited in the Deed of 1686, whereby the said Lord John charges the said Estate with the Plaintiffs said Portion. That the Interest of the said 6000 l. at 10 l. *per Cent.* with the Jointures limited to the said Mary and said Frances Arabella, being 800 l. *per Ann.* each, exceed the yearly value of the said Estate by 300 l. *per Ann.* which shews the exorbitant Use the said Lord John made of the said Power, so unwarrantably inserted in the Deed of 1667.

The said Mr. Kelly and his Wife pending the said Suit, brought an Ejectment for recovering the said intermix'd Lands, as Heir at Law to the said Lord John.

The present Lord Bellem preferr'd a cross Bill, setting forth that the said intermix'd Lands were subject to the Plaintiffs Portion by the Deed of 1686. That the same were forfeited by the Attainder of the said Lord John, the reversal of which Attainder cost the present Lord Bellem 8000 l. That it never was the intention of said Lord John, that the said intermix'd Lands should Descend to the Plaintiffs; that the said Lord John dyed outlaw'd, and was then under a disability to make any Settlement to prevent the Descend of the said Lands to the Plaintiffs, and pray'd that the said intermix'd



mix'd Lands might be brought in aid of whatever Portion the Court should Decree, and pray'd an Injunction to stop Proceedings on said Ejectment.

The Cause coming to a hearing on the Original, as well as cross-Cause, the Plaintiffs insisted that the said produced Articles of 1663. being a Counterpart sign'd only by the said *Mary Bermingham*, Wife of the said *John Lord Bellem*, was not sufficiently prov'd; whereupon the Lord Chancellor directed the validity thereof to be tried at Law on this Issue, *viz.* Whether Lord *John Bellem* did, before his Marriage with the said *Mary*, perfect Articles in the very Words of the Articles produc'd by the then Defendant Lord *Bellem*? tho' Lord *Bellem*'s Council did then oppose a Tryal on the said Issue on account of its being too narrow, as in Fact it happen'd to be; for proof being given to the Jury by a Gentleman who was of Council in the Cause with the Plaintiffs, and who, in the Year 1693, on a special Occasion had perus'd the other part of the Articles perfected by the said Lord *John*, and compar'd the same with the said counter-part produc'd on the hearing by present Lord *Bellem*, that the words (*who is to enjoy her own Estate for her separate Maintenance*) contained in the said produced Counter-part, but no way material to the Point in Dispute, ~~that~~ were not contained in the said Articles perfected by the said Lord *John*. The Jury was under a necessity of finding that the said Lord *John* did not perfect Articles in the very Words of the said Counter-part.

This special Issue was much labour'd for on the Plaintiffs part, they knowing, as it may be presumed, that on their said Councils Evidence, which he would thereof give to the Jury, the Issue, as it was worded, must be found for them; which unfairness was so much the greater, for that the Plaintiffs did not examin the said Witness in the Cause, notwithstanding they examin'd several other Witnesses.

The Verdict being Certify'd into Chancery, the Lord *Bellem* lay'd the aforesaid Artifice in procuring the said Issue before the Court, and insisting on the narrowness thereof, and that the same Evidence whereon the said Verdict was found against him, would upon a proper Issue be full Evidence for him upon Affidavits thereof, press'd the Court for a new Tryal, on a more proper Issue, *viz.* *Whether or no Lord John did perfect any, and what Articles on his Intermarriage with the said Mary Bermingham?* Which being refus'd by the Court, and the Cause coming to a hearing on the merits, Lord Chancellor Decreed 3000*l.* with Interest at five Pounds *per Cent.* to the Plaintiffs from the day of their Marriage, till payment; and all the Estate subject thereto, except 400*l.* *per Ann.* allowed Lord *Bellem* for his Maintenance, and 150*l.* *per Ann.* for the Maintenance of the said *Frances* to be sequestered, with Injunction to stop Proceedings on the said Ejectment till the Portion paid.

*The said Mr. Kelly and his Wife do Appeal from the said Decree, and for Cause complain.*

1<sup>st</sup>. That by the said Decree, they are to be paid their portion by perception of Profits.

*Answ.* The Appellants by their Bill only pray to be let into perception of Profits of the Estate lyable to their Portion, and so far the Decree agrees with their own Bill.

2<sup>dly</sup>. That 400*l.* *per Ann.* out of the Lands, lyable to their Portion, is Decreed to the said Lord *Bellem* for his Maintenance.

*Answ.* Lord Chancellor, according to the constant Rules of Equity used in Ireland, allows a Maintenance to the Owners of Estates lyable to Portions, when thereby the Portion is in no danger, as it is not in this Case; and 400*l.* *per Annum* cannot be judged too large a Maintenance for Lord *Bellem* and his Family, considering that all the residue of the said Estate being 1700*l.* *per Ann.* is divided amog the Widow and the said two Daughters of the said Lord *Walter*, and all this in Consideration only of 5000*l.* Portion, the other 1000*l.* with all the Interest thereof, remaining still in the Family of the said Sir *William Wentworth*, and no part of the said 5000*l.* came to the advantage of present Lord *Bellem*, or his Family.

It



It is confess'd that the said Estate, of the said *Mary Bermingham* the Mother of the said Lord *Bellew*, is come to the said Lord *Bellew*, by virtue of the Settlement by her thereof made, but that the said Lord *Bellew* was under a necessity of Morgaging the said Estate to almost the full value thereof for raising Mony for the Reversing of the said Lord *John's* Outlawry, and for the payment of 2000 *l.* to the late Countess of *Westmeath*, sole Daughter of the said Lord *John*, the same being the Portion limited to her, by the Deed of 1667. so that the said Lord *Bellew*, has no present benefit by the said Estate; and tho' it has been given out by the Appellants, that the said Lord *Bellew* has receiv'd 5000 *l.* of the Debts due to the said Lord *John* the Appellant, the Lord *Bellew* doth affirm the same to be untrue.

3dly. That the Appellants are by Injunction stop'd to proceed on the said Ejectment.

Answ. That the Lands for which said Ejectment was brought, are by the Deed of 1686. made lyable to the said Portion, and therefore the Injunction well grounded.

4ly. That Lord Chancellor did not Decree the Appellant ~~about~~ 300 *l.* which present Ld. *Bellew* receiv'd out of the lands for which said Ejectment was brought.

Answ. The Appellants made no mention of said Lands, or of the Profits thereout receiv'd by Lord *Bellew* in their Bill; and tho' the Lord *Bellew* did mention the same in his Cross Bill, yet the Appellants could not recover any thing on the Lord *Bellew's* Bill, and Lord Chancellor made the said 300 *l.* part of the Consideration for decreeing the Appellants any Interest at all.

5ly. That Lord Chancellor Decreed Interest at 5 *l. per Cent.* only and but 20 *l.* Costs.

Answ. Interest and Costs are intirely in the discretion of Lord Chancellor, especially in this Case, where no Interest is appointed to be paid the Plaintiff by the said Deed of 1686.

*Lord Bellew hath also Appealed from the said Decree, and for Cause complains.*

1st. That Lord Chancellor Decreed 3000 *l.* with Interest to the Plaintiffs, whereas it appears on the Face of the Deed of 1667. that they ought not to have been Decreed more than 1000 *l.*

2dly. Because Lord Chancellor, by denying a Tryal on a proper Issue for the validity of the said produced Counterpart of the said Articles of 1663. did Decree upon a Fact that was not fully laid before him, whereby the Appellant the Lord *Bellew* was depriv'd of the benefit of a material part of his Defence against the said Mr. *Kelly's* demands; for it appears, that upon a proper Issue, a Verdict must have been found for him, on the very proof that was given against him; and if the Issue had been found for him, the said Mr. *Kelly* and his Wife could not have recover'd, as is conceiv'd, any more than 1000 *l.* Wherefore the said Lord *Bellew* humbly hopes that this most Honorable House will Reverse the said Decree, and Order a new Tryal for the validity of the said Articles, upon such an Issue as is above mentioned, or as this most Honorable House in their great Wisdom, shall think fit and proper; or give him such Relief in the Premises, as to the said most Honourable House shall seem most just and Equitable.

THO. POWYS.  
JA. MOUNTAGUE.

Dennis Kelly, & } Appellants,  
Mary his Wife, }  
Richard Ld. Bellew, } Et E  
Respondent, } Contra.

The CASE of the  
Appellant the Lord  
BELLEW.

To be Heard at the Bar of  
the House of Lords, on  
the 25 day  
of February, 1707.